

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 394 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and  
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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DHANKA RAMLIYA RATHVA

Versus

STATE OF GUJARAT

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Appearance:

MR KG SHETH for Petitioner  
MR KM MEHTA, APP, for Respondent No. 1

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CORAM : MR.JUSTICE S.M.SONI and  
MR.JUSTICE J.R.VORA

Date of decision: 05/03/98

ORAL JUDGEMENT

Temaria Khaparia had one real brother Jenduria and accused Dhanka is their first cousin. As the father of Temaria and Jenduria had died when they were very young, they were initially staying at village Ambala. They having grown up, father of Dhanka brought them back

to village Tundava and handed over the land of their share to them. They were cultivating that land and were also staying in a house constructed on that land.

In evening of 23rd February, 1990, accused assaulted Jenduria saying that they have taken the share of the land of his father. On hearing the shouts of Jenduria, Temaria, PW 2, and Raising, PW 3 saw from their house Jenduria being assaulted. PW 3 rushed to the scene of offence while PW 2 only witnessed the incident from his house as he apprehended that if he goes to the scene of offence, he may also be killed. After assaulting Jenduria, accused Dhanka ran away to the house of Police Patel, PW 4. PW 2 then reached to the scene of offence where PW 3 was also present. PW 2, PW 3 and some others then went to the house of Police Patel, PW 4, where they found the accused present. Police Patel, PW 4, then came to the scene of offence, saw the one who had already died, went to village Rangpur where there is a police station and Temaria, PW 2 filed a complaint. Rangpur is at a distance of about 3 k.m. from Tundava.

On receipt of the complaint, Police Sub-Inspector, PW 8, registered offence and investigated into the matter. On completion of the investigation, he submitted chargesheet against the accused in the Court of Judicial Magistrate, First Class, Chotaudepur who in his turn committed the case to the Court of Sessions at Baroda.

Learned Addl. Sessions Judge framed charge against the accused to which accused pleaded not guilty and on completion of the trial, the learned Sessions Judge held the accused guilty of offence punishable under section 302 of the Indian Penal Code and sentenced him to rigorous imprisonment for life and a fine of Rs.2000/- in default rigorous imprisonment for one year. This judgment and order of conviction is under challenge in this appeal.

Learned advocate Mr K.G.Seth appearing for the accused has challenged the conviction on the ground that the evidence of the witnesses being full of contradictions should not have been accepted by the learned Additional Sessions Judge. The learned Addl. Sessions Judge also ought not to have accepted the evidence of two alleged eye witnesses, one being brother of the deceased and other being the neighbour, in absence of any independent corroboration. Mr Seth also contended that when the learned Addl. Sessions Judge has not accepted the extra judicial confession of the accused

made before the Police Patel, he ought not to have accepted the evidence of these other two witnesses as the case then becomes full of suspicion. He, therefore, prayed that the appeal should be allowed.

Learned Addl. Public Prosecutor, Mr Kamal Mehta supports the judgment. Mr Mehta contended that the evidence of two eye witnesses is most natural and convincing. Mr Mehta contended that the alleged contradictions do not affect the substantive evidence of the witnesses. Mr Mehta further contended that simply because one part of the evidence is not accepted and if that part of evidence is separable from the other, it should not affect the other part of the evidence. Mr Mehta contended that simply because the evidence of extra judicial confession is not accepted, it does not affect the other part of ocular evidence of two eye witnesses. Mr Mehta therefore contended that the appeal should be dismissed.

To appreciate the above contentions of the learned advocates, it is necessary to refer to the evidence of the witnesses. We would first refer to the evidence of Raising, PW 3, who has on hearing the shouts reached the scene of offence. PW 3 has stated that in the evening at about 6 'O clock when he was at his house, he heard shouts "marela, marela". He therefore ran towards that place (from where the shouts came). There he saw Dhanka after assaulting Jenduria running away to the house of Patel. Dhanka assaulted Jenduria on the neck, head, hand by 'palia'. On inquiry from Dhanka, he had replied that he assaulted for land. Thereafter, Gulabsing and Temaria had come. Then he in company of Tameria went to Naika Police Patel and told him that Dhanka has killed Jenduria. Police Patel then came to the scene of offence and saw Jenduria there and then went to the Police Station. Evidence of this witness is challenged on the ground that there are improvements in his evidence. The improvement which is proved is a statement that Dhanka after assaulting Jenduria ran away towards the house of Patel. In our opinion, this can neither be said to be an improvement nor a contradiction though it is proved during the evidence of PW 8. It is a natural human conduct. Raising has seen Dhanka going away at the time of incident. Before giving deposition in the court after giving statement before the police, he must have come to know that when Dhanka ran away from the scene of offence, he had gone to the house of Police Patel. Therefore, while deposing before the Court, if he states that Dhanka ran away to Police Patel after assaulting Jenduria, in our opinion, cannot be said to be

an improvement. It is a natural conduct because of the subsequent knowledge on the evidence. Therefore, this cannot be said to be an improvement affecting adversely the evidence of PW 3. PW 2 resides at a distance of about 100 steps from the scene of offence. From the evidence of Pancha, PW 5, Circle Officer PW 6 and the map Ex.20, it can be said that there is no obstruction to see and also reach to the scene of offence from the house of PW 3. PW 3 has specifically stated that he reached the scene of offence and saw Dhanka assaulting Jenduria with 'Palia'. Thus we do not find any reason not to accept the evidence of PW 3 and it cannot be said that the learned Addl. Sessions Judge has committed any error in accepting the evidence of this witness.

Evidence of PW 3, in our opinion, is further corroborated by the evidence of PW 2 who is again eye witness. PW 2 is the real brother of the deceased. As held by the Supreme Court in the case ..... there is no reason for an eye witness to let go the real culprit and to involve an innocent. PW 2 has categorically stated that at the relevant time he was in his house and on hearing the shouts when he saw in that direction, he found Dhanka assaulting Jenduria with 'palia'. He has specifically said that he did not go to the scene of offence as he was afraid that he may also be assaulted if he goes there. Evidence of this witness is challenged on the ground that it suffers from the vice of improvement. Improvement alleged is that the site of injuries as deposed before the Court and that the accused after assault ran away to the house of police patel was not the case before the Police. Be it so. But this improvement does not affect the truthfulness of the say of this witness. So far as improvement that accused went away to the house of Police patel is concerned, it will be on the same ground as we have referred in case of Raising, PW 2. So far as the injuries are concerned, be it that after giving complaint he might have come to know about the site of injuries. However, the fact remains that Dhanka assaulted Jenduria with 'palia'. Therefore, in our opinion, simply because PW 2 is the real brother and his evidence suffers from some improvement which do not adversely affect the substantive evidence, his evidence cannot be rejected.

The evidence of PW 2 and 3 is also corroborated by the evidence of doctor, PW 1. In post-mortem examination, following external injuries were found:

- "1. Over Rt. eyebrow an incised cutting wound at a size 1/2" x 1/3" x 2/3" was present.

2. Over lt. wrist joint an incised cutting wound of a size  $1\frac{3}{4}$ " x  $\frac{1}{3}$ " x  $\frac{1}{3}$ " was present.
3. Below Rt. shoulder over chest an incised cutting wound at a size  $\frac{1}{2}$ " x  $\frac{1}{3}$ " x  $\frac{1}{3}$ " was present.
4. Below Rt. ear an incised cutting wound extending from cheek to back of neck of a size 8" x  $1\frac{1}{2}$ " x 1" was present.
5. Below beard on Rt. side an incised cutting wound of size 4" x  $1\frac{1}{4}$ " x 2" was present.
6. On Rt. side below 5 wound an incised cutting wound over neck region of a size  $3\frac{1}{2}$ " x 1" x 2" was present.
7. Below 6th wound an incised cutting wound of a size  $1\frac{1}{2}$ " x  $\frac{3}{4}$ " x 2" was present.
8. On lt. ear an incised cutting wound of a size 8" x 3" x 2" was present.
9. Over lt. shoulder an incised cutting wound of a size 6" x 1" x 2" was present.
10. On waist lt. side an incised cutting wound of size 1" x  $1\frac{1}{4}$ " x  $1\frac{1}{4}$ " was present.
11. Over head occipital region, an incised cutting wound of a size 5" x  $\frac{1}{2}$ " x  $\frac{1}{4}$ " was present."

These injuries are on head, hand, chest, neck etc. Therefore the say of PW 3 as to the site of injuries is corroborated by the external injuries as referred to by the doctor PW 1. Doctor has specifically stated that external injuries Nos. 5, 6 & 7 are sufficient in the ordinary course of nature to cause death. There are consequential internal injuries as referred in the post-mortem note. Doctor has said that such injuries can be caused by weapon like Palia.

Evidence of PW 2 and 3 is also corroborated by PW 4 before whom PW 2 and 3 have reached immediately and have disclosed before him the incident. PW 4 is not an eye witness, but he was first in time who was informed by PW 3 and PW 2. Some contradictions in his evidence, in our opinion, are not relevant at all as he has not seen

the incident and he was only informed about the incident by PW 2 and 3.

Evidence of PW 2 and 3 is further corroborated by the evidence of Pancha Dhanka, PW 7 who proved the seizure of palia and doti of the accused from the house of Naika. PW 4 Naika has stated that palia and doti were placed at his residence by the accused. Palia and doti also bear blood stains of the group of deceased which was group 'O'. Thus the say of PW 2 and 3 is further corroborated by seizure of palia and doti vide Ex.22.

When the evidence of PW 2 and 3 of which PW 3 has seen the incident from a close and PW 2 has seen the incident from a distance and when their evidence is convincing and corroborated by independent evidence it cannot be said that the learned Addl. Sessions Judge has erred in accepting the same. We, therefore, do not find any reason to interfere with the conclusion arrived at by the learned Addl. Sessions Judge. Appeal is therefore liable to be dismissed and is hereby dismissed.

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(vjn)